Supreme Court, U.S
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No.

In the Supreme Court of the United States

PARENTS AGAINST TESTING BEFORE TEACHING, ET AL,

PETITIONERS

vs.

ORLEANS PARISH SCHOOL BOARD, LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U. S. COURT OF APPEALS
FOR THE 5TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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When state education officials- not classroom teachers-create a new "high stakes" test to measure the academic achievement levels of public school students,

THE CONSTITUTIONAL ISSUES BEFORE THE COURT

1. Are 4th and 8th grade public school students entitled to 14th Amendment due process safeguards relative to adequate notice of the test that becomes the sole basis for non-promotion?

2. Did Louisiana state education officials act arbitrarily and capriciously under *La. R. S. 1724.4* and other federal statutes by retaining 4th and 8th grade students in New Orleans where a test-related curriculum was not developed until three months after the LEAP test was administered?

3. Are public school students who are denied promotion by state education officials based on "a single measure" of student performance entitled to a private right of action under *20 U.S.C. 5812 and 5886?*

4. Do public school students have a liberty interest sufficient to invoke due process protections when state action attaches a stigma of "failure" as interpreted in *Goss v. Lopez (US SupCt 1975) and Brookhart v. Illionois (7th Circuit 1983)?*

5. Did the due process violation encroach upon concepts of justice as interpreted in St. Ann v. Palisi *(5th Circuit 1979) and Brown v. Board of Education (US SupCt 1954) ?*

LIST OF ALL PARTIES

PETITIONERS

PARENTS AGAINST TESTING BEFORE TEACHING, an unincorporated association; 1) CHARMAINE BRYANT, individually and on behalf on her minor child, Krystal Bryant; 2) BRYANT SMOOT; 3) STEPHEN SMOOT, individually and on behalf of their minor child, Lynette Smoot; 4) WAYNE THOMPSON; 5) ROMONA THOMPSON, individually and on behalf of their minor children, Savannah Thompson and Stephen Thompson; 6) NATHANIAL BROWN; 7) DIANE BROWN, individually and on behalf of their minor child, Irene Brown; 8) ALETHA FRANKLIN, individually and on behalf of her minor child, Dominique Franklin; 9) DIEDRA RAYFIELD, individually and on behalf of her minor child, Jessie Rayfield; 10) EVELYN MAGEE; 11) MELVIN MAGEE, individually and on behalf of their minor child, Maurice Magee; 12) TAMAR ALLEN, individually and on behalf of her minor child, Daniel Allen; 13) NAOMI MARK, individually and on behalf of her minor child, Tiffany Raines

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All parties have been served pursuant to Supreme Court Rule 29.3.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Parents Against Testing Before Teaching, et al , respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The judgment of the U. S. States Court of Appeals for the Fifth Circuit appears at Appendix A-2 to the petition and is unpublished.

The judgment of the U. S. States District for the Eastern District of Louisiana appears at Appendix A-3 to the petition and is unpublished.

STATEMENT OF JURISDICTION

Petitioners seek review of the judgment of the U. S. States Court of Appeals for the Fifth Circuit decided on September 17, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). This petition was filed within ninety (90) days of the entry of the judgment sought to be reviewed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. United States Constitution, Amendment 14, in pertinent part:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection under the law. "

2. Constitution for the State of Louisiana, Article I, in pertinent part:

Section 2. Due Process of Law

No person shall be deprived of life, liberty, or property, except by due process of law.

3. Federal Statutes, in pertinent parts:

20 U.S.C.*5812* (1) School readiness

"By the year 2000, all children in America will start school ready to learn.
...all children will have access to high-quality and developmentally appropriate preschool programs that help prepare children for school; ... every parent in the United States will be a child's first teacher and ...devote time each day to helping such parent's preschool child to learn, and parents will have access to the training and support parents need; ...children will receive the nutrition, physical activity experiences, and health care needed to arrive at school with healthy minds and bodies; and to maintain the mental

alertness necessary to be prepared to learn; and the number of low-birthweight babies will be significantly reduced; through enhanced prenatal health systems.

20 U.S.C.*5812* (3) Student achievement and citizenship

...by the year 2000, all students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter including English, mathematics, science, foreign languages,civics and government,economics, arts, history, and geography..."

20 U.S.C.*5812(8)(iii)* Parental participation

... parents and families will help to ensure that schools are adequately supported and will hold schools and teachers to high standards of accountability.

20 U.S.C.*5886(c)* State improvement plans

...Each state educational agency with broad-based classroom teacher input, shall establish and include in its State improvement plan strategies for meeting the National Education Goals by improving teaching and learning and students' mastery of basic and advanced skills in core content areas, such as English, mathematics, science (including physics), history, geography, foreign languages... "

20 U.S.C.*5886(c)(1)(B)*Student assessments

..Each state ...shall establish.. (B) a process for developing and implementing valid, non-discriminatory, and reliable State assessments-- (i) which assessments shall-- (I) be aligned with such State's content standards; (II) involve multiple measures of student performance; (C) a process for aligning State and local curricula,

instructional materials, and State assessments with the State content standards and State student performance standards; (D) a process for familiarizing teachers with the State content standards and State student performance standards and developing the capacity of teachers to provide high quality instruction within the content areas...

4. Louisiana Revised Statutes, in pertinent parts:

Revised Statute 17:24.4(F)

Criterion-referenced tests in English/language arts and mathematics based on state content standards and rigorous student achievement standards set with the same grade level nationally shall be piloted in grades four and eight during the 1997-1998 school year and implemented during the 1998-1999 school year if approved by the State Board of Elementary and Secondary Education.

Revised Statute 17:24.4 (F)(4)(a)

The department shall establish, subject to the approval of the State Board of Elementary and Secondary Education, the nature and application of various intervention options in the case of failure to demonstrate proficiency, which may include remediation, retention in grade, an alternate placement in succeeding grades, or any other option which support a student achieving the required proficiency level.

La. R.S. 17:24.4 (F)(4)(b)

"Establish a process for consistently seeking and considering input from teachers, administrators, city and school board members, legislators, parents, business leaders, and other persons in the community in developing and

establishing proficiency levels and the intervention options provided for in this paragraph.

STATEMENT OF THE CASE

Named petitioners are thirteen (13) public school parents who individually and on behalf of their 4th and 8th grade children, challenge Louisiana's use of a stated-created test to determine student promotions. Petitioners claim 14th Amendment due process violations and other claims under 20 U. S. C. section *5812, 5886* and La. R.S. 17:24.4. These students earned the right to be promoted based on successful academic work and evaluations by their respective classroom teachers but were retained because of the test commonly referred to as LEAP 21, an acronym for Louisiana Educational Assessment Program. In the lower courts, plaintiffs sought judicial relief in the form of a 3 to 5 year moratorium on the use of the test to determine student promotions. They did not seek a permanent ban on the use of the test.

HISTORICAL AND LEGISLATIVE BACKGROUND

In 1994, Congress passed legislation establishing a series of National Education Goals, 20 U.S.C., 5812, 5886, et seq. (commonly known as Goals 2000) which mandated State Improvement Plans "for the improvement of elementary and secondary education in the State." All states receiving federal funds for low income students (Title I) were required by law, to implement new testing or assessment standards applied equally to all students.

On July 15, 1997, the Louisiana Legislature passed *Act 1335* which amended and reenacted *Revised Statute 17:24.4(F)* and created, among other things, a the new testing program referred LEAP 21. The new program focused on student achievement and testing in four subjects: mathematics, English/language arts, science and social science. *Act 1335* imposed new student testing requirements and the attendant duties and responsibilities of the State Board of Elementary and Secondary Education, the state Department of Education, and local school boards. Classroom teachers were stripped of their historic authority to make promotion and retention decisions for students in their respective classes.

In September 1997 state education officials published the first draft copies of Teachers' Guides to Statewide Assessments for mathematics and English/language arts. Draft copies of guides for science and social studies were not published until October 1998. A second "draft" of teachers guides for mathematics and English/Language Arts was also published in 1998.

On June 30,1998, Mr. Cecil Picard, State Superintendent of Education sent each local school district a memorandum informing them of action taken by the Board of Elementary and Secondary Education at its June meeting. The letter stated in pertinent part:

> By October 1, 1998, each LEA [local education agency] shall have provided every K-8 teacher of English and/or Mathematics a copy of their local curriculum document..... By October 1, 1998, each K-8

teacher... shall have received minimum of 10 hours of training on the new curricula." By October 16, 1998, each local superintendent shall provide a "statement of assurance" to the State Superintendent of Education indicating that the curriculum documents have been provided and that the training has occurred." (Plaintiffs' Trial Exhibit "8").

The first LEAP test was administered statewide in March 15-19,1999 and used as a benchmark to determine academic achievement levels at that time. The test was cumulative in that it covered academic materials that students should have been taught between grades 1 and 4 and between grades 5 and 8. The test was not an end-of-the-year or final exam constructed by classroom teachers. Fortunately, no students were retained as a result of the test because nearly one-third of all 4th and 8th graders statewide failed either the mathematics of or English section of the test. The percentage of 8th graders from high-poverty school districts who failed the mathematics section of the LEAP test were as follows: East Carroll Parish (75%); Madison Parish (63%); East Feliciana (49%); and Tensas Parish (50%).

1999 LEAP test scores in Orleans Parish mirrored those of other Louisiana school districts with predominantly black student populations. 53% of all 8th graders and 42% of all 4th graders scored "Unsatisfactory" of the test. Approximately one-third of the students were in a group that state education officials labeled "Approaching Basic" and according to Louisiana's standards they "passed" the LEAP test.

On February 28, 2000, the Orleans Parish School Board adopted a formal Board Resolution asking state education officials not to use the LEAP test as the sole criteria for

student promotion. Local school officials admitted a lack of both teacher and student preparation. Board President Gail Glapion stated :

> "It's a bad public policy for this state to choose one test that removes the teacher totally and completely from the decision-making regarding the children...We believe in our teachers, and we believe in our children, with the proper intervention, can be successful."

Despite the alarmingly low test scores for 1999, and the obvious need for long-term educational reform, on April 25, 2000, the State Board of Elementary and Secondary Education adopted a policy mandating the non-promotion of students who failed either the Mathematics or English section of the LEAP test. Neither the 1997-98 Teachers' Guides nor Superintendent Picard's June 30,1998 letter to local school officials state that student promotions would be based on the LEAP test.

During the 2000-2001 school year, approximately 18,000 4th and 8th grade public school students statewide were denied promotion because of low scores on the LEAP test. However, the New Orleans Public School system is cited as the most egregious offender since its officials did not publish a new LEAP-based curriculum until August 2000, three months after over 5,000 4th and 8th grade students had been denied promotion based on their LEAP test scores. More specifically, 2,800 8th graders (53% of the entire class) and 2,410(42%) fourth graders were retained during the 2000-2001 school year. Petitioners are among this group.

PROCEEDINGS BELOW

State Court

The instant lawsuit was originally filed in the Civil District Court for the Parish of Orleans on August 21, 2000, seeking injunctive relief against ORLEANS PARISH SCHOOL BOARD; GAIL MOORE GLAPION, in her official capacity as Board President; THE LOUISIANA STATE BOARD OF ELEMENTARY & SECONDARY EDUCATION; GLENNY LEE BUQUET, in her capacity as president of the State Board of Elementary and Secondary Education; CECIL PICARD, in his capacity as Louisiana's State Superintendent of Education. More specifically, petitioners alleged due process claims under the Constitution for the State of Louisiana and La. R. S. 17:24.4. They asked the state court to enjoin all defendants from using the Louisiana's new LEAP test for the purpose of retaining 4th and 8th grade students.

Removal to Federal District Court

On August 23, 2000, a Notice of Removal was filed in the U. S. District Court for the Eastern District of Louisiana by all defendants, including Orleans Parish School Board and the Louisiana State Board of Elementary and Secondary Education. Plaintiffs amended their complaint to include 14th Amendment Due Process claims, a private right of action under 20 U.S.C., sections 5812 and 5886 and *Title VI of the Civil Rights Act of 1964.*

August 29, 2000, the defendants filed a Motion to Dismiss for failure to state a claim and for lack of standing under FRCP Rule 12 B (6). Subsequently, all parties filed memoranda.

Motion Hearing

September 14, 2000, the district court judge heard limited oral argument from plaintiffs and defendants on the motion to dismiss and plaintiffs' motion for preliminary injunction. Plaintiffs were only allowed to obtain testimony by stipulation from the two key defendants, the local School Board President , Ms. Gail Glapion, and the State Superintendent of Education, Mr. Cecil Picard. Only one plaintiff witness provided direct testimony, Dr. Ramona Jean Mitchell. The court allowed the defendants to reurge their dismissal motions. and ruled from the bench that plaintiffs lack constitutional standing to bring their claims in federal court on 14th Amendment due process claims. The court ruled from the bench in favor of all defendants pursuant to FRCP 58 noting that 4th and 8th grade students lacked constitutional standing to bring a claim in federal court. Please see Appendix, A-6.

Reservation and Voluntary Dismissal of Plaintiffs' Title VI Claims

While dismissing all of plaintiffs' constitutional claims, the court provided plaintiffs an opportunity to conduct discovery with respect to their Title VI claims. Plaintiffs were told from the bench that they could not expect to prevail on the remaining claims unless they could prove intentional discrimination. On October 5, 2000, plaintiffs filed a Motion to Dismiss Title VI Claims without prejudice and reserving the right to reurge said claims. The motion was granted on October 10, 2000.

District Court Judgment and Reason for Judgment

On October 10, 2000, the district court issued a 2-page written Judgment and Reasons For Ruling (Appendix, A-3). The district judge wrote: "Although the Fifth Circuit found that the students in *Debra P. v. Turlington, 644 F. 2d 397 (1981),* had a property interest in a diploma, no court has ever recognized a property interest in promotion."

Remaining State Claims

The court failed to address plaintiffs state "due process" claims.

Appeal Document Filed in the 5th Circuit

On October 13, 2000, plaintiffs filed a Notice of Appeal to the U. S. Court of Appeals for the 5th Circuit. On January 24, 2001, the Original Brief By Plaintiffs-Appellants was filed in the 5th Circuit. State Education Defendants filed their Original Brief on February 23, 2001 and Orleans Parish School Board filed an Original Brief on February 26, 2001. Plaintiffs- Appellants' filed a Reply Brief on March 21, 2001.

Oral Argument

In their Original Briefs to the 5th Circuit, both Plaintiffs-Appellants and Orleans Parish School Board suggested to the court that oral argument may be beneficial. The State Education Defendants told the court "Oral argument is not necessary."

On August 9, 2001, all parties were heard by a 3-judge panel of the U. S. States Court of Appeals for the Fifth Circuit before Judges DAVIS and JONES, Circuit Judges and BARBOUR, District Judge. A transcript of the argument is included herewith as Writ Appendix A-9.

Petitioners suggest that the transcript of the oral argument may include both facts and legal arguments that are most beneficial to this Court in considering the merits of their petition.

Motion to File a Post Argument Brief

Plaintiffs-Appellants filed a motion for leave to file a post argument brief August 10, 2001, and the motion was denied on August 14, 2001 by Circuit Judge Edith H. Jones.

Judgment of the 5th Circuit

On September 17, 2001, the 5th Circuit Court of Appeals in a one-page PER CURIAM opinion having found no deficiency in the appellants' notice of appeal "affirm[ed] for essentially the reasons stated by the district court." Please see Writ Appendix A-2. According to the 5th Circuit, "The [district] court did not err in finding no due process violations under federal or state law. The only case cited by the circuit court was *Debra P.*, supra., with no reference to the issue of a student's property or liberty interest in a public education. As with the district court, the 5th Circuit reference to the rights of public school students under the state laws cited in plaintiffs briefs, oral argument and pertinent portions of the records.

REASONS FOR ALLOWANCE OF THE WRIT

THE 5TH CIRCUIT HAS DECIDED A NOVEL 14TH AMENDMENT DUE PROCESS ISSUE THAT POTENTIALLY AFFECTS MILLIONS OF PUBLIC SCHOOL STUDENTS AND WHICH

SHOULD BE SETTLED BY THE SUPREME COURT

The factual and legal context of this dispute present a novel due process issue of compelling national importance. The U. S. Congress has recently mandated annual tests for every 3rd through 8th grade public school student in America. If these test results are used for the limited purpose of identifying academic weakness and providing appropriate academic support, petitioners would encourage and welcome such use. However, state education defendants in Louisiana and other states use the results of these external and cumulative tests to deny end-of-the-year grade promotion to students. otherwise qualified for promotion based on academic standards established by the classroom teacher and local school board. Historically, 14th Amendment due process questions adjudicated by this Court involved disciplinary and academic dismissals. Never has this Court considered the question of academic retention as presented in the context of the instant case.

THE 3-JUDGE PANEL REFUSED TO APPLY CONTROLLING LEGAL STANDARDS ESTABLISED IN PRIOR 5TH CIRCUIT CASES, A 7TH CIRCUIT CASE, AND SEVERAL LANDMARK SUPREME COURT CASES

As discussed below, numerous federal courts have addressed "property interest" and 14th Amendment due process rights of public school students. Included among the more significant cases relevant to a proper legal determination of the instant case are the following U.S. Supreme Court cases: 1) *Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975);*

2) Tinker v. Des Moines Independent Community School Districts, 393 U. S. 503;
3) San Antonio School District v. Rodriguez, 411 U. S. 1, 93 S. Ct. 1278, 36 L.Ed. 2d 16 (1972); and 4) Paul v. Davis, 424 U. S. 693, 701-702, 96 S.Ct. 1155, 1160-1161.

The district and the 5th Circuit in the instant case stated that two prior 5th Circuit cases only applied to graduating seniors, *Debra P. v. Turlington* (474 F. Supp. 244 (1979). *Debra P. v. Turlington, 644 F. 2d 397 (1981); Rehearing En Banc Denied Sept. 4, 1981.* However both cases extensively cite *Goss, Tinker and Rodriguez*, infra which did not involve graduating seniors but younger students. Only the U. S. Supreme Court as the national expounder of federal law, can resolve this conflict.

Moreover, the petitioners direct the Court's attention to the Seventh Circuit case of *Bookhart v. Illionois, 697 F. 2d 179, 184 (1983)* where 14 handicapped elementary and secondary students challenged a Peoria School District requirement that they pass a minimum competency test to graduate. While the elementary school students were years away from graduation, they too had constitutional standing as plaintiffs. This is the opposite result of the 5th Circuit ruling regarding Louisiana's LEAP test. In holding that plaintiffs had a protected liberty or property interest at stake, the 7th Circuit in Brookhart, at page 185, cited *Goss v. Lopez*, supra:

> "Plaintiffs in this case have more than merely an interest in protecting their reputations and avoiding the stigma attached to failure to receive a high school diploma. They, too, as in Goss v. Lopez, supra, had

> a right conferred by state law to receive a diploma if they met the requirements imposed prior to 1978: completion of seventeen course credits and fulfillment of the State's graduation requirements. In changing the diploma requirement, the government action by the School district deprived the individual of a right or interest previously held under state law. Plaintiffs thus have a liberty interest sufficient to invoke the procedural protections of the due process clause. *Board of Educ. v. Ambach, supra 436 N. Y. S. 2d at 572-573.*

PUBLIC SCHOOL STUDENTS OF ALL AGES HAVE BEEN AFFORDED CONSTITUTIONAL RIGHTS FOR OVER 80 YEARS.

The 1969 landmark U. S. Supreme Court case, *Tinker v. Des Moines Independent Community School Districts (393 U. S. 503),* held that public school students are "personsunder our Constitution... possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." Thus, 15-year-old John J. Tinker and his 13-year-old sister, Mary, had a constitutional right to wear black armbands to their public school "symbolically speaking" against the war in Vietnam.

Mr. Justice Fortas delivered the opinion of the Court:

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their

> constitutional rights to freedom of speech or expression at the school-house gate. This has been the unmistakable holding of this Court for almost 50 years."

DUE PROCESS REMAINS AN IMPORTANT FEDERAL QUESTION

The extent to which due process is afforded students in academic matters versus disciplinary matters is an unsettled legal issue and one that can only be resolved by this Court. As noted by Chief Justice Rehnquist in *Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1997):*

> " ... we have frequently emphasized that [t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy, 367 U. S. 886 895 (1961).* The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of academic dismissal."

In *Mahaviongasan v Hall, 529 F. 2d 448 (5th Cir. 1976)*, the Fifth Circuit considered the application of due process standards to the denial of an academic degree. Plaintiff was pursuing a graduate degree in education and objected on constitutional and contractual grounds to the university's belated decision to require a comprehensive examination for receipt of the degree after the commencement of her studies.

In *Debra P. v. Turlington*, infra, the 5th Circuit distinguished *Horowitz:*

> " *The practical problems in Horowitz were* manifest. Sifting through an individual student's past clinical record, rehashing physician evaluations, and litigating bedside manner were problems foreign to judicial expertise. The factual context in the instant case is very different. The Court is not asked to evaluate an individual student's performance, but to resolve a dispute involving the legislative decision to implement a test which determines graduation from high school with the standard credential, a diploma. While the factual inquiry is considerably different so are the parties. The Plaintiff in Horowitz was pursuing graduate education in advanced studies. The plaintiff in all classes in the instant case were participating in secondary education required by the state compulsory education law.

The 5th Circuit in Mahaviongasan also discussed *Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975):*

> "The Supreme Court in Goss recognized that even the suspension of a student for one day infringed upon the students' due process property right in attending school. Students in Florida are required to attend school pursuant to the state's compulsory attendance statute... Graduation is the logical extension of successful attendance."

While the state has redefined in a sense, what successful attendance for purposes of a diploma should be,

the Court is of the opinion that the SSAT II requirement should be excluded for the same reason that notice of the test has been shown to be inadequate.

See also Crump v. Gilmer Independent School District, 797 F. Supp. 552, 555 (E.D.Tex. 1992) which cited *Debra P.*, supra, as the controlling authority in holding that " in order to meet constitutional standards, at least four to six years was required to implement a new testing requirement.

INADEQUATE NOTICE OF THE TESTING SCHEDULE

In a landmark case involving state-mandated tests for public school students, a U. S. District Court in Florida decided *Debra P. v. Turlington* (474 F. Supp. 244 (1979). Plaintiffs challenged the timing of testing schedule for Florida's State Student Assessment and questioned whether the test instrument measured what was actually taught in the classroom.

The detailed substantive analysis of the trial court may be instructive because of the many striking similarities with Louisiana's testing schedule. In Florida, teachers became aware of the objectives of the test four months in advance of the first administration of the test, but only two months of instruction in the application of the skills. At page 263 and continuing, the Debra P. court noted:

> "The results of the first administration reflect the obvious adequacy of the prior instruction in the stated objectives. From December, 1977, the date the

> results of the first administration were released, until April, 1979, the date the third and last administration was held, only thirteen months of instructional time intervened. During this period remediation classes for those who failed were held in almost every Florida county...but those materials were not immediately available."

PREPARATION FOR A CUMULATIVE TEST IS A TIME CONSUMING PROCESS

The decision of the district court was affirmed by the 5th Circuit, cited as *Debra P. v. Turlington, 644 F. 2d 397 (1981); Rehearing En Banc Denied Sept. 4, 1981.* The 5th Circuit held, inter alia, that it was fundamentally unfair and a violation of the Due Process Clause to administer a high-stakes test that covers matters not taught to the students. Louisiana's LEAP test covered 4 years of academic information for 4th graders and 8 years for 8th graders. The test was "cumulative" as opposed to an en-of-the-year exam that the classroom teacher would normally prepare. By imposing a single external test, Louisiana has stripped teachers of the right to do make promotional decisions regarding their own students. According to the court, just as a teacher in a particular class gives the final exam on what he or she has taught, so should the state give its final exam on what has been taught in the classrooms. Again, quoting Debra P.:

> ... This problem is indicative of a much larger issue. Although there is evidence that certain skills were not taught in Florida public schools, let us assume arguendo that all the skills were taught... The

> principal problem with the instant program is that the instruction in previous years took place in an atmosphere without the specific objectives now present and without the diploma sanction. Instruction of the skills necessary to successfully complete the functional literacy test is a cumulative and time consuming process. Knowledge of how to successfully perform the functional literacy skills is not taught in any specific grade, in any specific class, or from any specific type of teacher. It is critical that at the time of instruction of a functional literacy skill, the student knows that the individual skill is being taught must be learned prior to his graduation from a Florida public school."

The court quoted the Report of The Florida Task Force on Educational Assessment Programs: ...They were suddenly required to pass a test constructed under the pressure of time and covering content that was presumed to be elementary but that their schools may or may not have taught them recently, well, or perhaps at all.

In retrospect, the Task Force believes that the schedule for implementing statewide high school graduation standards was too severe. We feel that the most of problems that are identified in later sections of this report are the result of trying to do too much in too little time. Consequently, we believe that the problems can and will be solved over time. Task Force on Educational Assessment Programs, Competency Testing in Florida Report to the Florida Cabinet (Part I) 4 1979

STATE AND LOCAL EDUCATION OFFICIALS WERE ARBITRARY AND CAPRICIOUS IN IMPLEMENTING STATE AND FEDERAL LAWS AND PARENTS HAVE A PRIVATE RIGHT OF ACTION UNDER APPLICABLE FEDERAL STATUTES

In 1994 the federal government's National Education Goals, ***20 U.S.C., 5812*** (commonly known as Goals 2000) gave all states until this school year, 2000-2001, to adopt assessments keyed to new curricula and instructional materials. State and local education officials in Louisiana failed to begin implementing the 1994 federal law until 1997 *(Act 1335)*. It is important to note that in 1977, the Louisiana legislature had mandated that testing programs "shall be implemented beginning with the second grade and shall sequentially incorporate an additional grade level each year thereafter until grades two through twelve have been included" but state education officials never complied with that orderly way of implementing new testing programs---starting from the beginning.

When state officials finally began implementing *20 U.S.C. 5812* which required new state plans to improve public schools, they violated *20 U.S.C. 5886 , et al* which required "multiple measures of student performance" in state plans. Multiple measures, at a minimum would be classroom tests, papers, projects and evaluations by teachers who interact with these students for nine months. According to *20 U.S.C.5812(8)(iii)* "parents and families will help to ensure that schools are adequately and will hold schools and teachers to high standards of accountability. Congressional intent is clear and parents should have a private right of

action under federal law and jurisprudence. Please see text of relevant statutes, Section VI of this petition.

On April 25, 2000, the State Board of Elementary and Secondary Education adopted a policy mandating the non-promotion of students who failed either the Mathematics or English section of the LEAP test. Neither the 1997-98 Teachers' Guides nor Superintendent Picard's June 30,1998 letter to local school officials state that student promotions would be based on the LEAP test.

In 2000-2001 school year, approximately 18,000 4th and 8th grade public school students statewide were denied promotion because of low scores on the LEAP test. However, the New Orleans Public School system is cited as the most egregious offender since its officials did not publish a new LEAP-based curriculum until August 2000, three months after over 5,000 4th and 8th grade students had been denied promotion based on their LEAP test scores.

Petitioners were denied due process of law under the ***Constitution for the State of Louisiana , Article I*** which reads in pertinent part:

> Section 2. Due Process of Law
> No person shall be deprived of life, liberty, or property, except by due process of law

The defendants were arbitrary and capricious in mandating non-promotion in light of the above facts and the letter of La. R.S. 24.4 which allowed other intervention options including remediation or less punitive measures. Parents

had little or no input in "piloting" or testing intervention options under *La. R.S. 17:24.4 (F)(4)(b), supra* which required the consistent involvement as well as that of teachers and other community persons.

There was no research that showed non-promotion would "support a student achieving the required proficiency level". In fact, in the District Court Transcript, (Page 97, line 9) State Superintendent Cecil Picard, speaking through his attorney, Mr. Curry, admitted that state education officials failed to even review the Pilot Study to assess the progress of the new LEAP program prior to testing the students in 1999 or 2000.

MR. CURRY: The Superintendent, if we're talking about the Superintendent, did not review them. He does not have personal knowledge of whether or not they were reviewed.

MUTUAL UNDERSTANDING AND QUASI - CONTRACTUAL RIGHTS

In addressing the contractual nature of the students' "entitlement to a public education" the 5th Circuit had observed in Debra P.supra :

> "From the students' point of view, the expectation is that if a student attends school during the required years, and indeed more, and if he takes and passes the required courses, he will receive a diploma. This is a property interest as that term is used

constitutionally. See Goss v. Lopez, 419 U. S.565, 579, 95 S. Ct. 729, 738, 42 L. Ed. 2d 725, 737 (1975).

This contention is supported by the clear and sincere statement made by Orleans Parish School Board Member,Carolyn Green Ford, in urging state officials not to use the LEAP test for promotional purposes:

> "There has not been enough time for schools to prepare their students for the test, Ford said... interventions other than nonpromotion should be employed for assuring that fourth and eighth graders are better prepared to pass the newly created content-standards LEAP 21 test."

A 14TH AMENDMENT LIBERTY INTEREST IS IMPLICATED WHEN INJURY TO A STUDENT'S REPUTATION IS COMBINED WITH GOVERNMENTAL ACTION

Given the facts in this dispute, non-promotion is a punitive state action. State education officials, under the guise of "holding students accountable" damage a student's reputation or good name by attaching a "stigma" of failure or retainee. In Goss, 419 U.S. 565, public school students were suspended for up to 10 days. This Court stated, in pertinent part: The Due Process Clause also forbids arbitrary deprivations of liberty, where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimum requirements of the Clause must be satisfied. The undeserved retention of a

student for an entire school year is far more damaging than a 30-day suspension. Non-promotion is the suspension of academic progress. Peers might call these students dumb or stupid and peer relationships are paramount in the minds of all students. In the instant case, had the district court allowed to plaintiffs the opportunity to call their expert witness, psychiatrist Roger L. Wortham, he would have focused on the psychological harm to students denied promotion and the fact that petitioners were significantly more likely to drop out of school.

In *Bookhart* at page 185, supra, the 7th Circuit discuss this issue:

> "Though the Supreme Court held that injury to reputation alone does not implicate a liberty interest, *Paul v. Davis, 424 U. S. 693, 701-702, 96 S.Ct. 1155, 1160-1161*, it went on to say that liberty interests are implicated when injury to reputation is combined with "governmental action [that] deprived the individual of a right previously stated under state law." Id. at 708-709, 96 S. Ct. at 1164. The Court in Paul reviewed its holding in *Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725*, involving the procedural due process rights accorded a student suspended from school on charges on charges of misconduct... It was the removal of the right or interest" from the recognition and protection previously afforded by the State, which we found sufficient to invoke procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment." Id. at 711, 96 S. Ct. at 1165."

THE IMPLIED ECONOMIC AND SOCIAL VALUE OF ANNUAL GRADE PROMOTIONS

At page 3 of their 5th Circuit Reply Brief , petitioners reasoned , if one can admit that a diploma is a property right having economic value (awarded only by cumulative promotions), then cumulative grade promotions have economic value. Moreover, petitioners assert the "economic" and "societal" value of due process in the public school setting. The *Debra P.*, court and numerous courts cite *the landmark case Brown v. Board of Education*; 347 U. S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873, 880:

> "Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society." It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if it is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

JUSTICE AND FUNDAMENTAL FAIRNESS

The Brown case and the federal statutes quoted herein cite the importance of civics and citizenship. A collateral issue is justice which the 5th Circuit addressed in *St. Ann v. Palisi, 495 F. 2d 423, 425 n. 5 (5th Cir. 1974)*:

> "The due process violation potentially goes deeper than deprivation of property rights without adequate notice. When it encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid actions which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair. We believe that the state administered a test that was, at least on the record before us, fundamentally unfair in that it may have covered matters not taught in the schools of the state."

CONCLUSION

Although the state of Louisiana constitutionally may not be obligated to establish and maintain a school system, it has done so, required attendance and created a mutual expectation that the student who successful complete all academic work assigned by his or her teachers during the school year will be promoted to the next highest grade at the end of that year. This expectation can be viewed as a state-created "understanding" that secures certain benefits and that supports claims of entitlement to those benefits. *Board of Regents v. Roth, 408 U. S. 564, 577, 92 S. Ct.*

2701, 2709, 33 L. Ed. 2d 548 (1972). As the district court in Debra P. observed "graduation is the logical extension of successful attendance" then promotion is the logical extension of successful attendance during the school year. Petitioners applaud Louisiana's effort to improve the achievement level of all public school students. Educational improvement is long overdue in Louisiana but this state did too much too soon after failing to act between the 1994 federal mandate and the 1997 LEAP initiative. Petitioners sincerely believe that the problems "can and will be solved over time". Without a "due process" opportunity for these students to challenge the timing and relatedness of these non-teacher tests, the very fabric of public education may be eroded. The testing schedule adopted by state officials frustrates an otherwise legitimate state interest .

The State of Louisiana should continue to administer the LEAP test but a 3 to 5 year delay in the use of the test to determine promotion will balance the state's 10th Amendment powers with students' 14th Amendment rights. It is not in the state's interest that its education officials unilaterally and untimely usurp the traditional authority of classroom teachers and local school boards in the classroom setting. Students, parents and teachers have rights under the U. S. Constitution and no child should be left behind ! To rephrase Mr. Justice Harlan's eloquent words in his dissenting opinion in *Plessy v. Ferguson, 163 U. S. 537 (1896):*

What can more certainly arouse teacher-student divisiveness, what more certainly create and perpetuate a feeling of distrust between teachers, students and

government officials, than state enactments, which, in fact, proceed on the ground that students and their classroom teachers are so inferior and degraded that they cannot be allowed to sit in a public school classroom for an entire year and make a reasonable and quasi-contractual determinations as to what was taught and what was learned ? That, as all will admit, is the real problem with ***Act 1335***, the1997 student testing legislation as was enacted in Louisiana.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Willie M. Zanders, Sr. 12-16-01

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Supreme Court, U.S.
FILED
011025 DEC 16 2001
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

PARENTS AGAINST TESTING BEFORE TEACHING, ET AL,

PETITIONERS

vs.

ORLEANS PARISH SCHOOL BOARD, LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE 5TH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31267

PARENTS AGAINST TESTING WITHOUT TEACHING, an unincorporated association; CHARMAINE BRYANT, individually and on behalf of her minor child, Krystal Bryant; BRYANT SMOOT, STEPHEN SMOOT, individually and on behalf of their minor child, Lynette Smoot, WAYNE THOMPSON, ROMONA THOMPSON, individually and on behalf of their minor children Savannah Thompson and Stephen Thompson, NATHANIEL BROWN, DIANNE BROWN individually and on behalf of their minor child, Irene Brown, ALTHEA FRANKLIN, individually and on behalf of her minor child Dominique Franklin, DIEDRA RAYFIELD, individually and on behalf of her minor child, Jessie Rayfield, EVELYN MAGEE, MELVIN MAGEE, individually and on behalf of their minor child Maurice Magee, TAMAR ALLEN, individually and on behalf of her minor child, Daniel Allen, NAOMI MARK, individually and on behalf of her minor child, Tiffany Raines,

Plaintiffs-Appellants,

versus

ORLEANS PARISH SCHOOL BOARD, GAIL MOORE GLAPION, in her official capacity as Board President, THE LOUISIANA STATE BOARD OF ELEMENTARY & SECONDARY, GLENNY LEE BUQUET, in her capacity as president of the State Board of Elementary and Secondary Education, CECIL PICARD, in his capacity as Louisiana's State Superintendent of Education,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
Civil Docket #00-CV-2525

Before DAVIS, and JONES, Circuit Judges and BARBOUR, District Judge.*

PER CURIAM:**

This court has carefully considered the issues on appeal in light of the parties' briefs, oral argument, and pertinent portions of the records. Having done so, we, first find no deficiency in the appellants' notice of appeal and therefore have appellate jurisdiction.

Next, we affirm for essentially the reasons stated by the district court. The court did not err in finding no due process violations under federal or applicable state law. In particular, the Deborah P. case cited by appellants pertains to the narrow right of graduating seniors to obtain a diploma, and not to any expectation of promotion in the public schools from year to year. Deborah P. v. Turlington, 644 F.2d 397 (5th Cir. - - Unit B 1981). Further, appellants' briefing did not sustain their assertion of private causes of action under federal statutes, including those covering age discrimination. The district court did not abuse its discretion in denying a preliminary injunction against the administration of the LEAP21 test and enforcement of its results.

The judgement of the district court is **AFFIRMED.**

---

*District Judge of the Southern District of Mississippi, sitting by designation.

** Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir . R. 47.5.4.

September 17, 2001

A-3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PARENTS AGAINST TESTING	CIVIL ACTION
VERSUS	NO. 00-2525
ORLEANS PARISH SCHOOL BOARD, ET AL	SECTION "N"

JUDGE EDITH BROWN CLEMENT PRESIDING
THURSDAY, SEPTEMBER 14, 2000 AT 10:30 AM

Courtroom Deputy: Pam Radosta
Court Recorder: Dee Malouse
Appearances: Willie Zanders and Errol Ware for plaintiffs
Franklin Endom, James Stapp, Michael Hicks, Richard Curry, Michael Rubin, for defendants

MOTION OF STATE DEFENDANTS TO DISMISS AND MOTION OF ORLEANS PARISH SCHOOL BOARD DEFTS. TO DISMISS:

Argument

PLTF'S MOTION FOR PRELIMINARY INJUNCTION:
Witnesses sequestered.
Pltf's witnesses: Dr. Rosalind Hale- testimony by stipulation
Ramona Jean-Mitchell- sworn & testifies
Gail Glapion-testimony by stipulation
Ramona Jean-Mitchell- recalled, resumes testimony

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00-2525 - September 14, 2000

Pltf's witnesses cont'd: Superintendent Picard - testimony by stipulation.
State Defendants re-urges Motion to Dismiss - argument.
IT IS ORDERED that Motion of all defendants to Dismiss - **GRANTED,** with the exception of the Title VI Claims. Plaintiff given 60 days to conduct discovery.
IT IS FURTHER ORDERED that Plaintiff's Motion for a Preliminary Injunction is **DENIED.**
Written reasons to be entered.
Plaintiff to amend the complaint in one week.
Court adjourns.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PARENTS AGAINST TESTING BEFORE TEACHING, ET AL.	* CIVIL ACTION
VERSUS	* NO. 00-2525
ORLEANS PARISH SCHOOL BOARD, ET AL.	* SECTION "N"

JUDGMENT

In accordance with the Minute Entry entered contemporaneously herewith, **IT IS ORDERED, ADJUDGED, AND DECREED,** pursuant to FED.R.CIV.PROC. 58, that judgment be entered in favor of all Defendants and against all Plaintiffs, each party to bear its own costs.

New Orleans, Louisiana, this 10TH day of October, 2000.

/s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
CLEMENT, J.
October 10, 2000

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

PARENTS AGAINST TESTING BEFORE TEACHING, ET AL.	* CIVIL ACTION
VERSUS	* NO. 00-2525
ORLEANS PARISH SCHOOL BOARD, ET AL.	* SECTION "N"

REASONS FOR RULING

On September 14, 2000, the Court heard oral argument on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motions to Dismiss. The Court granted Defendants' Motions and dismissed all claims except for Plaintiff's title VI claims. Plaintiffs were given 60 days to conduct discovery with repect to those claims.

Although the Fifth Circuit found that the students in Debra P. v. Turlington, 644 F.2d 397 (1981), had a property interest in a diploma, no court has ever recognized a property interest in promotion, *see, e.g.,* Erik V. v. Causby, 977 F. Supp. 384, 388 (E.D.N.C. 1997)(denying plaintiffs' preliminary injunction motion because, *inter alia,* a "right to promotion from one school grade to another" has never been recognized) , and several courts have rejected the notion. See Killion v. Burl, 860 F.2d 306 (8th Cir. 1988) (per curiam) (affirming summary judgement in favor of defendants

on student's due process claim because no liberty or property interest in promotion to the second grade"); Hartfield v. East Grand Rapids Pub. Schs., 960 F. Supp. 1259, 1266-67 (W.D. Mich 1997)(granting defendants motion to dismiss because, *inter alia*, the children had no "liberty or property interest in promotion to the ninth grade")(citing Killion). Perhaps in light of this authority, Plaintiffs did not assert an interest in promotion, but instead asked the Court to enforce their constitutional rights to "due process [and] fundamental fairness" in education. See Plaintiff's Mem. in Support of Prelim. Inj. p.1 and Oral Argument. It is well settled, however, that there is no free-standing right to "fairness" or "process;" rather, to bring a due process claim, a plaintiff must show that he or she has been deprived of life, liberty, or property without the due process of law. See, e.g., Killion, 860 F.2d at 306 (citing Board of Regents v. Roth, 408 U.S.564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)). Because plaintiffs failed to established that they have been deprived of a liberty or property interest, the Court granted Defendants' Motion to Dismiss with respect to the Plaintiff's constitutional claims.

The Court also found an insubstantial basis for Plaintiffs' other claims. For example, Plaintiffs failed to provide any authority to demonstrate that a private cause of action exists under 20 U.S.C.

The Court provided Plaintiffs with an opportunity to conduct discovery with respect to their Title VI claims. However, on October 5, 2000, Plaintiffs moved to dismiss these claims without predjudice. The Court granted the unopposed motion on October 10.

Because all of Plaintiffs' claims have been dismissed, the court shall order judgment in favor of Defendants.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PARENTS AGAINST TESTING
CASE NO.: 00-31267

BEFORE TEACHING,

PLAINTIFF-APPELLANTS

VERSUS

ORLEANS PARISH SCHOOL BOARD,

LOUISIANA STATE BOARD OF ELEMENTARY

AND SECONDARY EDUCATION, ET AL,

DEFENDANTS-APPELLEES

* * * * * *

The oral argument in the above-entitled cause, before Dorothy N. Gros, a certified court reporter.

Held at the United States Court of Appeals, 600 Camp Street, New Orleans, on Thursday, August 9, 2001, beginning at 11:16 a.m.

APPEARANCES:

COURT OF APPEALS: Judge Davis
(Presiding)
Judge Jones
Judge Barbour

REPRESENTING APPELLANTS:
Willie M. Zanders, Esq.

REPRESENTING APPELLEES:
Michael H. Rubin, Esq.
Franklin V. Endom, Jr.

REPORTED BY: DOROTHY N. GROS, CCR
CERTIFIED COURT REPORTER

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PROCEEDINGS

Judge Davis:

We'll call the last case of the day, PARENTS AGAINST TESTING VERSUS ORLEANS PARISH SCHOOL BOARD. We will hear first from Mr. Zanders.

MR. ZANDERS:

Good morning and thank you, Your Honor. It's an honor to present legal argument on behalf of public school parents and students who have petitioned this court for relief. We would like to cover four basic issues that were presented before the District Court to give the Court an idea of the critical issues as we see them here in Fifth Circuit.

One, in the District Court, plaintiff argued that fourth and eighth grade students have a property interest and a liberty interest in a public education. I respectfully suggest that this question was answered in a 1981 case heard by the Fifth Circuit called DEBRA P. VERSUS TURLINGTON.

The second issue presented was our argument that state education officials arbitrarily and capriciously implemented the LEAP program in violation of Louisiana Revised Statue 1724.4.

And, the third issue raised was the plaintiff's position that in addition to the student's federal constitutional rights, Louisiana's constitution afforded them due process and equal protection under the law. And, the fourth issue is that Louisiana's fast track implementation of the LEAP testing program was fundamentally unfair and it was inconsistent with the due process mandate of the 14th amendment.

On the first issue raised, that of student's having a property interest in the public education, we direct the Court's attention to the language in the 1981 case which states that the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which may be protected by the due process laws and in the District Court the main argument was that fourth graders and eighth graders did not have such a property interest in education - -

JUDGE DAVIS:

I guess the problem I have with that argument is I don't see how failure to pass this test deprives them of a public education. What it requires them to do is either to retake the test or repeat the previous grade. So, how is this depriving them of a public education?

MR. ZANDERS:

Well, Your Honor, I would respectfully suggest that the key term in the language is that they have a property interest in a public education as opposed to whether or not they are being denied a public education. Is there any value to being promoted. So, in response to Your Honor's question, in the Debra P. case the court said that graduation is the logical extension of successful attendance. Now if graduation is the logical extension of successful attendance. That's the same as saying that graduation is a logical extension of promotion or being promoted. We're saying that promotional decisions have some value. But for being promoted, one could never graduate. Being promoted is the pathway to graduation or to a diploma. To deprive students of that pathway is to deprive them of a diploma and I should say to the Honorable

Court that even the State education officials admitted in their process. I would direct the Court's attention to page 14 in the school board's brief and it says, specifically, "The school board defendants do not dispute the existence of a property right in a free public education under Louisiana law. The existence of this property right requires the observance of federal procedural due process minimum." I understand the technical implications of the fact that they are being educated so then they are not being deprived of anything of value or not being deprived of an education. These students have been retained and will be retained at grade level.

The other issue is in the Fifth Circuit case, the U.S. Supreme Court case, GOSS VERSUS LOPEZ, is cited. GOSS VERSUS LOPEZ stands for the proposition is that the due process laws also forbids the arbitrary deprivation of liberty where a persons good name, reputation, honor is at stake. These students have been labeled illiterate. They've been labeled failures and we believe that students under the 14th amendment as in the GOSS case, the 1975 Supreme Court case and there was a 1966 Supreme Court case called TINKER VERSUS DEMOINES.

Now in the Tinker case, the Supreme Court said, and I quote, "Students and teachers are not deprived or do not shed their constitutional rights at the schoolhouse gate. Now in that Tinker
case - -

JUDGE BARBOUR:

What if a child was not promoted to the fifth grade because the child had missed "x" number of days from school. I assume the New Orleans school system has some minimum days that they are required for attendance for promotion.

MR. ZANDERS:
Yes.

JUDGE BARBOUR:
What's the difference in that and not passing the test? If promotion is the property issue.

MR. ZANDERS:
Judge Barbour, here is one major distinction. We have the students who did not pass the standards as set forth by their teachers, those students are not before the court as part of the petition. Those students should not be promoted. We're talking about students who were denied promotion based on a test, the LEAP test, that was implemented in March of 1999 and in Orleans Parish the curriculum for the LEAP test was not distributed until August of 2000. So, they were not taught any materials on this state mandated test.

JUDGE BARBOUR:
That's the due process claim, I'm talking about your status claim as to whether this is a property interest.

MR. ZANDERS:
Well, in the Debra P. case and that's our best jurisprudence on the issue. In that case the students were in the tenth grade, eleventh grade and twelfth grade. It was a Florida literacy test dealing with illiteracy. And there was no distinction made by this Court as to distinction between the tenth grader or the eleventh graders because all were not graduating at that point. So all were afforded according to that case a four year delay in the

implementation of the test and that's what we're asking. We understand that under the 10th amendment, the state has the right to test students. We understand that that's part of the disciplinary power.But for jurisprudence says that in implementing its policies the state must do so in a manner that's consistent with the constitution. So, if I understand the question in terms of standing, then I believe that a careful review of the jurisprudence with GOSS VERSUS LOPEZ and with another Fifth District Case,Burnside case, which we mentioned in our brief, the Court in disciplinary matters has not made a distinction in terms of standing and the right of students with disciplinary problems to come before the Court and I would feel that unless it's a new area and a greater distinction of law that students with questions about a test that will hold them back have as much right to appear in the Court as a student who has been expelled for a disciplinary reason because the case law does not make a distinction between the nature of the right for those students who come to court.

JUDGE JONES:

Let's say your students can't pass these LEAP test and notwithstanding that they keep moving from grade to grade, what is the implication of that?

MR. ZANDERS:

Your Honor - -

JUDGE JONES:

Let's say the fourth graders can't pass, does that mean that you're basically going to teach fourth grade things in fifth grade and suppose they still can't pass, are you going to move fourth grade up to six graders.

MR. ZANDERS:

No, Your Honor, what we're suggesting is that the information is that when the State has mandated this new program, and we agree that ultimately students will improve academically. But to test fourth graders, this was not an end of the year exam. This was a cumulative four year exam. I think that distinction is important. So, the fourth graders was tested on four years of material. Now, had it been a year end exam and then - - I understand Your Honor's point. But this was a four year exam, a cumulative exam for fourth graders with no notice in Orleans Parish in terms of the materials and it was an eight year exam for eighth graders, eight year cumulative.

JUDGE JONES:

I'd be a lot more concerned about that if we were talking about college and where you're learning different things every year. But, I have two children and I must say if they had forgotten by fourth grade what they learned in first grade, I'd want them held back. I don't quite understand this cumulative argument that you're making.

MR. ZANDERS:

Your Honor, I think in terms of cumulative, it's the nature of that state test that was criteria referenced based on specific materials. Based on specific materials that the State with it's consultants came up with as opposed to materials that the students fourth grade teachers -

Your Honor, if I were to respond to that on the same level in terms of fourth grade. If the teachers of fourth graders at the local level believed and recommend that the students be promoted based on what they learned during those months, then in this instance those students would not be promoted because of the LEAP test.

In American Educational Affairs never before have teachers and local school boards been replaced in terms of making such academic decisions when even the local board and we've made that representation at the lower court. The local board passed a resolution saying that the teachers and students were not prepared. So, as part of this accountability plan the only individuals who were punished and held fully accountable were the students. The teachers have not been held accountable. The local board has not been. We're not pointing fingers, the point is we're saying that students should not be retained until there has been adequate time for the teachers to teach the materials. So, it is a process issue.

JUDGE DAVIS:

You think that this Court is equipped to tell the State at what point the teachers are ready to give the test and what point the students are ready to take the test?

MR. ZANDERS:

Your Honor, with all due respect, I think this very Court in 1981 established the most important case in high sta[k]es testing. And that case is DEBRA P. VERSUS TURLINGTON and it's cited every where and the Fifth Circuit Court of Appeals denied and said that the State of Florida must wait four years before they implemented their literacy test. We're saying with all due respect that had the District Court looked at the established law precedent in that case, then the evidence would have been fully presented, which we were not allowed to do so because of the standing issues. So, yes, Your Honor, with all due respect this Court has done it. The Debra P. case stands unchallenged in terms

of telling the State that it did not allow enough time for its new literacy program.

JUDGE BARBOUR:

Didn't Debra P. turn on a discriminatory issue as opposed to a straight education?

MR. ZANDERS:

Your Honor, that was one of five issues. But, Debra P. it was the fact that it had been under desegregation orders and there was a long number of African American students - -

JUDGE BARBOUR:

Your not alleging any racial animus in the action of the city schools?

MR. ZANDERS:

Yes in our District Court, not on Appeal. In the District Court level we pointed out that in urban communities there was an astonishing large number of African Americans, 15,000 out of 20,000, but that was mentioned at the District Court level. The issue of disparated impact is not mentioned here. We are only dealing with the due process issue, fundamental fairness issue. This is the exact language that comes from the Fifth Circuit opinion. So, no, we are not saying on appeal that it was race because we were told that we would have to prove that it was intentional,which would have been difficult under the circumstances.

The other case that's important to be cited is a case called Crump and the citation 797 federal supplement 552, CRUMP VERSUS GILMORE. Now, that was a Texas

case, Judge Jones, a 1992 case. And in that case the Texas District Court said that eighteen months was inadequate time for a new testing program. So, yes,Courts have and we believe they should, given the constitutional issues at stake, look to State and Government and say, "You're doing the right thing but perhaps too soon." And that's what the Court said in the Florida case. That the implementation was the problem. And that it was fundamentally unfair to test students on materials that they have never been taught. Courts have done it and the record is very clear on those issues.

We would also like to mention as I have the yellow light is that State educational officials had a duty to review the material that are related to
LEAP but in the District Court testimony, the superintendent said no one at his office had reviewed any of the curriculum materials. In the record there was testimony given, so the State hurriedly put the LEAP program together, started with testing as opposed to accountability and the students were held accountable first and last and no one else has been held accountable. We're saying not to get rid of the test but to put it on hold to give all parties an opportunity to learn the new materials and that's the question of fairness and perhaps it is also a question of justice in that the students are being treated different from anyone else.

JUDGE DAVIS:

You have some time left for rebuttal, Mr. Zanders.

MR. ZANDERS:

Yes.

JUDGE DAVIS:

Mr. Rubin.

MR. RUBIN:

As Judge Jones pointed out in the GRIFFITH VERSUS JOHNSON case in 1990 and NEWORTH VERSUS LOUISIANA STATE BOARD OF DENTISTRY in 1988 in the absence of a liberty or property interest there can be no due process violation. Seven things are abundantly clear in this case.

First, the plaintiffs concede below and in their brief, page eleven and the record at page 105 that there is no constitutional right to a promotion. They concede that point. Secondly, they don't seek to halt the LEAP test. Third, this is not a class action and any request for injunctive relief is moot. Fourth, every child who is a plaintiff here continues to receive an education, continues to receive remediation and summer school even if they have not scored approaching basic. Not even basic, but approaching basic on the LEAP test.

Fifth there are no title claims here. Sixth, those have been dismissed. Seventh, every single statute relied upon by the plaintiff as providing a cause of action even assuming they have been properly briefed, which they haven't do not create a private cause of action. And last, the notice of appeal demonstrates that this court is without jurisdiction.

Let me jump right into the case. Where does this bruting claim that they claim is there exist? This constitutional right. Well, certainly it's not in Debra P. Debra P. involved two issues. One, as Judge Barbour noted was because of discriminatory effect that it was having on students who have gone segregated schools below. And secondly, because the diploma was the property right. It was

the cessation of education. It was the right to leave with something that has value in the market place. Somebody who leaves school without a diploma has a different market place value than somebody who leaves it with a diploma. This is a cessation of education case.

Certainly can't be found in the case law with on suspensions that's Goss, that removes a kid from the courtroom. As this court held in Navarras, (phonetic) taking a child who was disruptive and putting him in a different educational environmental doesn't trigger due process, well here we're taking a kid and leaving him in the same educational environment with remediation. Certainly, it cannot be found in Tinker, which is a 1st amendment case or on cases on race discrimination which you just heard counsel say he disclaims any intentional discrimination here.

There is really a question of a floating constitutional right that they want to create - - It is the Pandora's box of horrors because if indeed there is a right to promotion then every test that relates to promotion creates a due process issue because all of that goes toward the promotion decision. So, first grade coloring assignment that goes toward promotion ultimately as a due process and the second grade spelling test and fifth grade science assignment and sixth grade essay of how I did my summer vacation. Every test of which any portion goes toward a promotion decision would have a due process rule. That is not the law and that shouldn't be the law. In fact, five different courts have looked at this very issue and have rejected that claim. Three federal courts, the Fourth, the Eighth and the Eleventh have specifically held there is no constitutional right to promotion. The Fourth Circuit case is the Sandlin (phonetic) case that's cited in New Orleans brief, 643 Fed second 1027. The Eighth Circuit case is KILLIAN VERSUS BURROW,

it's cited in our brief. And the Eleventh Circuit case is Bester. In fact, Bester was decided three years after Debra P. They all cite Debra P. As Bester noted, this was Judge Godbul (phonetic) writing for the court. "Minimum reading standards for promotion do not violate due process because students have no legitimate expectation that failing to do satisfactory work will allow them to stay at a level that is academically unsatisfactory". And that's a case in which there was an objective test.

The two district court cases are ERIC VERSUS COSBY and Hartfield, (phonetic) both cited in our brief. In ERIC VERSUS COSBY not only did they find no constitutional right to promotion, but in that case the standards were put in place one year before the test. Here Louisiana statutes are RS-17, as I'll get to in a minute, promulgated more than ten years before this test talked about this issue. And although I don't believe any evidence is before this Court properly because this is a Motion to Dismiss. The only witness the plaintiffs put on testified that she knew as early as 1993 and 1994 what was going to be tested and what the standards were and that any teacher could look at those standards and see.

Now the statute the plaintiffs cite don't create a private cause of action. The Louisiana constitution says there's a right to education, it doesn't say there's a right to promotion. There's certainly no right under federal statutes that they've cited. I think they've been waived for failure to brief but in any event both are funding statutes. One was appealed in 1999, 20USC Section 5886 was repealed a year before the case was filed. This Court has held time and time again that there is no private right of action under appropriation measures and they don't by any stretch of the imagination meet the full court versus ASH test. The

Louisiana operative statute is 17:24.4. It passed in the early '70s amended in the '80s and as late as the '80s it said, in 1997 and '98 there's going to be a pilot plan in '98, '99. There's going to be test for the fourth and eighth grade and it says in that statute that's been on the books for many many years that if the students fail to achieve a level of proficiency then they among the remedies that are provided for is not to be advanced to the next grade. The plaintiffs cannot hold public school districts to an implementation of educational standards in a public school setting. When we talk about the cases, there is not a single ounce of support for the plaintiff's position. And more importantly five separate courts have specifically rejected those claims including three that had objective test.

I do want to mention briefly the jurisdictional issue. We briefed it, they did not appeal from the only order that's appealable, the October 10th order and although they parsed the words in their brief about what they thought they said, they didn't say it in the order. But even if this case is properly before the Court, no Court has ever imposed a constitutional criteria on a test given by schools and used in promotion decisions. No court has ever held that because there is a property right in a diploma, there is a property right in promotion. In fact, every court since Debra P. that has looked at that has rejected. As the court held in the Sandlin case, the Fourth Circuit, educational decisions on academic performance on stands of promotion are " Peculiarly within expertise of legislatures and are particularly inappropriate for review in a judicial context." This court should not do what no other Court has done. It should not create a right where none exist. It should not hold that every test that could be used for promotion triggers due process inquiry. The

decision below on the Motion for Dismiss is correct and should be affirmed.

Judge Davis:
Mr. Edom.

Mr. Edom:

Good morning, Your Honors. My name is Frank Endom for the Orleans Parish School Board, defendant. We join in Mr. Rubin's comments and would like to add just a few. First, to clarify a quote that was taken from the school board's brief from page 14 relative to the liberty of due process rights. The counsel did not complete the entoire sentence when he read, " The existence of this property right requires the observance of federal procedural due process minimum in some situations", "in some" situations. Citing GOSS VERSUS LOPEZ, page 14 of our brief. That leads us to the point that if the Court observes the relief sought here is for a moratorium of the retention policy established by BESE for a three or four year period. A moratorium. Therefore, the interest at stake here is whether persons can be protected -- There is protection for promotions under the due process laws and as Mr. Rubin has pointed out such protection does not exist. As the Supreme Court long ago in BOARD OF REASON VERSUS ROTH said, first we must look to see what interest is at stake before we decide whether or not due process applies. If it is not a constitutional protected right, due process does not apply. When you look at Debra P. case, you will see that the Court first found in an implied property right the expectation coming out attending classes and so forth are also found a valuable property right to their diploma. It is only after that the Court found a property right in graduation and a diploma

that they looked at the issue of fairness. Fairness then would be an exceptional procedure and if we don't have due process to begin with, due process protection then the question of fairness doesn't come from the Court and for those reasons we submit that the Court was correct in granting the school board the State's motion to Dismiss and the judgement should therefore affirm. Thank you.

Judge Davis:

Okay, thank you. Mr. Zanders, back to you.

Mr. Zanders:

May it please the court. I would like to go directly to the representation by counsel that five courts had ruled that students did not have a right dealing with education decisions.

Judge Davis:

That's not exactly what he said. He said there's no property right in promotion.

Mr. Zanders:

Yes. Thank you, Your Honor, for that correction. But I'd like to refer the Court to those four cases and let the Court know what those four cases was about. In KILLIAN VERSUS BURROW, the Eighth Circuit case, a first grader who had failed basic courses was mistakenly admitted into the second grade. He should not have been promoted and we agreed with that. But, the issue of a student failing regular courses, one first grader is not the same as a State imposed test where 20,000 students are

retained. So, that case is distinguished from the LEAP case and it involved an isolated incident of one student and one teacher.

Another case NAVARRAS VERSUS SAN MARCO, (phonetic) that's a Fifth Circuit case but in NAVARRAS a fifteen year old was suspended for throwing rocks at passing cars. He was suspended, placed in remedial programs. So, counsel would argue that's it's okay to put people in remedial programs. We agree in that instance where a student had disciplinary problems. That was the Fifth Circuit case. But we're talking about a State mandated retention for remediation prior to teaching which totally different from the NAVARRAS VERSUS SAN MARCO.

Another case, ERIC VERSUS COSBY,the District Court cited that case in the ruling. The Eric V. case is different from our case in that Eric V. students were given end of the year test as opposed to, and that's why Judge Jones I mentioned cumulative, It was an end of the year test. More importantly parents -- The State required that parents be notified about the need for remediation prior to the test. In Louisiana there was no such prior notification.

In the last case, the fourth case I'd like to mention is BESTER VERSUS TUSCALOOSA, an Eighth Circuit case. That case specifically mentions Debra P. as a controlling authority but in Bester it was a fight over social promotions. We're saying that if teachers say that students should not be promoted, then they should not be promoted. But, I would like the Court to look at our brief when Orleans Parish School Board passed a resolution saying that the students weren't ready. When the board president said that the State should not remove teachers from the evaluation process. Now, in terms of the notice that students were given. The letter on the easel is dated June 30, 1998. That

was the letter with the update for LEAP material, June 30th. In that letter there is no mention of retention. There were various options but no mention of retention as Plaintiff Exhibit A and then in the same letter there's language about remediation and specifically the State said that money will be set aside for remediation and those remediationprograms could be used as various intervention options. Retention was just one of many. There was no mention as of '98 about students being retained. And then how do we know that enough time wasn't given. The test results speak for themselves and in Orleans Parish only eighteen percent of the students were performing at the basic level. Fifty-two percent of the students eighth graders were retained.

Now, in any education circle in American if ten percent of the students are retained perhaps the students are at fault. Fifty percent, someone else is at fault. And we respectfully, suggest that in no way would we come before this honorable court and talk about every test that a teacher gives gives that student a right to go to Federal Court. Teachers have that right. But, we're saying the State has taken the right away from the teachers and have imposed a test whether it is difficult or not difficult, the test results show that it is difficult. The numbers this year reflect basically the same failure as before. So, we're asking the Court to look at the right of students given another important case BROWN VERSUS BOARD OF EDUCATION, Topeka, Kansas, which is mentioned again in Debra P. That court said -- The case said that today education is the most important state function. Education teaches citizenship. It teaches students to respect authority. And if the Court does not allow students to have some moratorium on this, we think it will do more harm against the State interest than good. Thank you.

Judge Davis:

Thank you, Mr. Zanders. We have your case gentleman. Thank you very much. Finish with the docket for the week. The Court will recess.

* * * * *

(Whereupon, Court was adjourned at 11:50 a.m.)

REPORTER'S PAGE

I Dorothy N. Gros, Certified Court reporter in and for the State of Louisiana, the officer, as defined in Rule 28 of the Federal Rules of Civil Procedure and/or Article 1434 (B) of the Lousianan Code of Civil Procedure, before who this is sworn testimony was taken, do hereby state on record:

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That any words and/or names which could not be verified through references material have been denoted with the phrase " (phonetic)".

/s/ Dorothy N. Gros
Dorothy N. Gros, CCR

CERTIFICATE

I, Dorothy N. Gros, Certified Court reporter, in and for the State of Louisiana, authroized by the laws of said State to administer oaths and to take the depositions of witnesses, hereby certify that the foregoing matter was taken before me at the time and place herein above stated; the matter being reported by me and thereafter transcribed under my supervision; that the foregoing pages contain true and correct transcription of the matter as thus given to the best of my ability and understanding.

I further caertify that I am not of counsel nor related to any of the parties to this cause, and that I am in no wise interested in the result of said cause.

/s/ Dorothy N. Gros
Dorothy N. Gros, CCR

Supreme Court, U.S.
FILED
JAN 25 2002
OFFICE OF THE CLERK

No. 01-1025

In The

Supreme Court of the United States

PARENTS AGAINST TESTING BEFORE TEACHING, an unincorporated association, *et al.*,

Petitioners,

versus

ORLEANS PARISH SCHOOL BOARD; GAIL MOORE GLAPION, in her official capacity as Board President; THE LOUISIANA STATE BOARD OF ELEMENTARY & SECONDARY EDUCATION; GLENNY LEE BUQUET, in her capacity as president of the State Board of Elementary and Secondary Education; CECIL PICARD, in his capacity as Louisiana's State Superintendent of Education,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, THE LOUISIANA STATE BOARD OF ELEMENTARY & SECONDARY EDUCATION; GLENNY LEE BUQUET, IN HER CAPACITY AS PRESIDENT OF THE STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION; AND CECIL PICARD, IN HIS CAPACITY AS LOUISIANA'S STATE SUPERINTENDENT OF EDUCATION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the district court properly dismiss the Petitioners' suit for failure to state a claim when:

   A. Courts uniformly have held that students have no "property right" to be promoted from one grade to the next, and without a property right there can be no due process violation; and

   B. The state and federal statutes relied upon by the Petitioners do not create private causes of action?

2. Did the appellate court have jurisdiction, and, if so, is this case now moot?

LIST OF PARTIES

Petitioners: Parties Plaintiff:

PARENTS AGAINST TESTING BEFORE TEACHING, an unincorporated association;

CHARMAINE BRYANT, individually and on behalf on her minor child, Krystal Bryant;

BRYANT SMOOT, STEPHEN SMOOT, individually and on behalf of their minor child, Lynette Smoot;

WAYNE THOMPSON, ROMONA THOMPSON, individually and on behalf of their minor children, Savannah Thompson and Stephen Thompson;

NATHANIAL BROWN, DIANE BROWN, individually and on behalf of their minor child, Irene Brown;

ALETHA FRANKLIN, INDIVIDUALLY and on behalf of her minor child, Dominique Franklin;

DIEDRA RAYFIELD, individually and on behalf of her minor child, Jessie Rayfield;

EVELYN MAGEE, MELVIN MAGEE, individually and on behalf of their minor child, Maurice Magee;

TAMAR ALLEN, individually and on behalf of her minor child, Daniel Allen; and

NAOMI MARK, individually and on behalf of her minor child, Tiffany Raines.

LIST OF PARTIES – Continued

Respondents: Party Defendants and Disclosure In Accordance with Rule 29.6

All of the Respondents are local or state governmental agencies and individuals who serve in official capacities with these agencies.

ORLEANS PARISH SCHOOL BOARD;

GAIL MOORE GLAPION, in her official capacity as Orleans Parish School Board President;

THE LOUISIANA STATE BOARD OF ELEMENTARY & SECONDARY EDUCATION;

GLENNY LEE BUQUET, in her capacity as President of the State Board of Elementary and Secondary Education; and

CECIL PICARD, in his capacity as Louisiana's State Superintendent of Education.

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COUNTER-STATEMENT OF THE CASE

PROCEEDINGS BELOW

Petitioners sought to delay implementation of a statewide test administered to them as fourth and eighth graders; passage of the test was required for those students to proceed to the next grade. Two groups of defendants were named: the State Defendants, consisting of the political governing body that oversees education statewide, its President, and the State Superintendent of Education;[1] and the New Orleans Defendants, consisting of the Orleans Parish School Board and its President.[2] The student plaintiffs also sought to compel their promotion to the next grade even though they had failed to achieve a satisfactory score on the test.

The Petitioners filed suit in state court; the matter was timely removed to the United States District Court for the Eastern District of Louisiana. The Respondents filed a motion to dismiss the complaint for its failure to state a claim as to which relief could be granted. The district court, after combining a hearing on the Fed. R. Civ. P. 12(b)(6) motion with Petitioners' request for a

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[1] The State Defendants are: the Louisiana State Board of Elementary & Secondary Education; Glenny Lee Buquet, in her capacity as President of the State Board of Elementary and Secondary Education; and Cecil Picard, in his capacity as Louisiana's State Superintendent of Education.

[2] The New Orleans Defendants are the Orleans Parish School Board and Gail Moore Glapion, in her official capacity as Board President.

preliminary injunction,[3] dismissed the complaint (Pet. App. A-5). The United States Fifth Circuit Court of Appeals affirmed in an unpublished per curiam opinion (Pet. App. A-1).

COUNTER-STATEMENT OF FACTS

The "facts" considered on a motion to dismiss are the allegations in the complaint.[4] While there is a substantial dispute as to the accuracy of these allegations, at this point in the case the only thing pertinent is the complaint's allegations and whether they state a claim.

At its most basic, the complaint alleges two causes of action. First, the complaint asserts that fourth and eighth grade students have a "due process" right to be promoted to the next grade, although courts repeatedly have held there is no student property right in being promoted. Second, the complaint alleges various claims based on Louisiana and federal statutes, although nothing in these statutes creates a private cause of action and no court has ever held that a private cause of action exists under these

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[3] The hearing was held on September 14, 2000. Because Rule 12(b)(6) motions to dismiss are based solely on the pleadings and evidence is not considered, the district court first heard oral arguments on the motions to dismiss. During oral argument, the district court determined that additional discovery was needed concerning Petitioners' Title VI claim. The district court therefore deferred ruling on the motion to dismiss and heard evidence on the Petitioners' request for a preliminary injunction (2 R. 18). The Petitioners later dismissed their Title VI claims. Pet. Brief, p. 10.

[4] *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961).

provisions. Based upon these assertions, Petitioners sought to delay implementation of the state-wide test, and they sought to be promoted to the next grade.

ARGUMENT

The petition for a writ of certiorari should be denied. All circuit and district courts addressing this issue have held that students do not have a property right in a promotion and thus there can be no due process violation in failing to promote those who fail to achieve a satisfactory score on a standardized test. There is neither a split in the circuits on this issue nor an important question of federal law upon which this Court should, but has not, ruled. Moreover, there is no private right of action, express or implied, under any of the statutes on which Petitioners rely, and one of those statutes has been repealed.

I. Federal Courts Consistently Have Held That There Is No Property Right In Promotion From One Grade To The Next.

This Court has held that "[p]ublic education is not a 'right' granted to individuals by the Constitution,"[5] for "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so

[5] *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

protected."[6] Because there is no independent constitutional right to a public education, in order to state a due process claim the Petitioners must establish a property or liberty interest of which they have been deprived.[7] There is no such interest.

The Fifth Circuit's ruling, below, is in line with the holdings of the Fourth,[8] Eighth,[9] and Eleventh Circuits,[10] as well as district courts,[11] that there is no constitutional right of promotion from one grade to the next.

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[6] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

[7] The Petitioners' application cites *Paul v. Davis*, 424 U.S. 693 (1976), without argument. The case stands for the proposition that some generalized claim of damage, such as to one's reputation, does not create a property or liberty interest "sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701. It in no way supports Petitioners' case and, indeed, demonstrates the fallacy of Petitioners' assertions.

[8] *Sandlin v. Johnson*, 643 F.2d 1027 (4th Cir. 1981) (holding that no constitutional issue is raised by failing to promote a student from one grade to the next).

[9] *Killion v. Burl*, 860 F.2d 306 (8th Cir. 1988) (holding that a student has no due process liberty or property interest in being promoted to the next grade).

[10] *Bester v. Tuscaloosa City Bd. of Educ.*, 722 F.2d 1514 (11th Cir. 1984) (no property right in being promoted from one grade to the next).

[11] *Erik V. v. Causby*, 977 F.Supp. 384 (E.D.N.C. 1997) (denying a preliminary injunction because there is no right to promotion); *Hartfield v. East Grand Rapids Pub. Sch.*, 960 F.Supp. 1259, 1265-66 (W.D. Mich. 1997) (no right to advancement to the ninth grade).

Petitioners' reliance on *Debra P.*[12] and similar diploma cases[13] is misplaced. Those cases dealt with twelfth grade and graduate students being denied a diploma. The fact that graduating students may have a property interest in receiving a diploma which allows them to terminate their education and receive a certificate which may have a value in the job market, however, is of no relevance to fourth and eighth grade students' claims that they have a purported "property right" to be promoted to the next grade. No fourth or eighth grader can claim the "right" to graduate upon completion of that grade – the right to end his or her education at that point. Indeed, the Eleventh Circuit in *Bester v. Tuscaloosa City Bd. of Educ.*, 722 F.2d 1514, 1516 (11th Cir. 1984), found no property right in promotion from one grade to the next and explicitly distinguished *Debra P.*, finding it inapplicable to promotion decisions based upon system-wide minimum reading standards. *Bester* held that "an expectation of the plaintiff students that the schools would continue to promote students performing in a substandard manner is not reasonable and cannot form the basis of a property right."[14]

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[12] *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981), *reh. en banc den.*, 654 F.2d 1079 (5th Cir. 1981), *aff'd after remand* (and after the split of the Fifth Circuit into the Fifth and Eleventh Circuits), 730 F.2d 1405 (11th Cir. 1984).

[13] Other diploma cases cited by the Petitioners in their brief were *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976), and *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179, 181 (7th Cir. 1983).

[14] *Bester* is especially noteworthy in its distinguishment of the Fifth Circuit's opinion in *Debra P.*, for *Bester* occurred after the 1981 split of the Fifth and Eleventh Circuits and was decided

It should be noted that Petitioners misread *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983), in alleging (Pet. Brief, p. 14) that the case centers on the age of the students; the issue in *Brookhart* was a test that was "a prerequisite to receipt of a diploma" in high school. 697 F.2d at 181. Therefore, *Brookhart* does not stand for the proposition that promotion decisions involve a property or liberty interest.

There is nothing extraordinary in the Fifth Circuit's ruling. It is in line with the unbroken chain of precedents holding that, because students do not possess a property interest in moving from one grade to the next, there is no due process issue that can form the basis of a cause of action. There is no issue here worthy of granting the writ of certiorari.

II. The Other Constitutional Cases Relied Upon By Petitioners Are Inapplicable.

Petitioners, unable to find any jurisprudence supporting their contention that a due process inquiry is triggered when fourth and eighth grade students are not promoted, apparently attempt to argue by analogy by citing, without any detailed discussion, other cases that

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under a rule that made Fifth Circuit precedent (including *Debra P.*) binding on the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*). The ruling in *Bester* occurred one year before the Eleventh Circuit itself affirmed *Debra P.* (a case arising in Florida), for *Debra P.* was appealed a second time to the Eleventh Circuit after having been remanded to the district court by the Fifth Circuit following the first appeal.

deal with education. None of these cases provide any support for Petitioners' theory.

Petitioners' reliance on discipline cases, such as *Goss v. Lopez*, 419 U.S. 565 (1975), is without merit. *Goss* involved a due process claim relating to the procedures for expulsion and suspension of high school students for misconduct. *Goss'* holding, relating to students who were being barred from the classroom, has no relevancy to the Petitioners here who are being educated in school, who are not being suspended or excluded from school. This distinction was pointed out in *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 26 (5th Cir. 1997), involving a student who had been detained by police for aggravated assault and who was then transferred out of regular classes into an alternative program. The student relied upon *Goss*, but *Nevares* held it was inapplicable, because, unlike *Goss*, the student was "not being denied access to public education, even temporarily." *Id.* The students in the instant case are not being deprived of an education either; they are continuing with their studies.

Likewise, Petitioners' citation of a First Amendment case such as *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), is inapposite. The holding and language of the case on a student's First Amendment freedom of speech and expression have nothing to do with educational promotions and testing, and the case has no relevancy whatsoever to the instant situation.[15]

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[15] As this Court stated, "Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities." *Tinker*, 393 U.S. at 507.

Finally, Petitioners' citation of *Brown v. Board of Education*, 347 U.S. 483 (1954), and of the failed equal protection attack on Texas' method of funding public schools through a property tax system, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), have no bearing here. The constitutional issues presented by Petitioners in their application are based solely on due process grounds. Pet. Brief, p. (i).

III. There Is No Private Cause Of Action Under The Statutes Relied Upon By Petitioners.

A. There Is No Private Cause Of Action Under 20 U.S.C. §§ 5812 And 5886.

Petitioners' reliance on 20 U.S.C. § 5886 is curious, to say the least. This statute was *repealed* effective September 30, 2000.[16] In any event, this provision was merely a funding statute, requiring states to take certain initiatives if they wished to receive an allocation of federal monies. The statute did not contain a substantive requirement that the state use multiple methods of evaluating students.

20 U.S.C. § 5812 ("National Education Goals") is not a mandate but rather an aspirational statement, encouraging states to assure that students leave the fourth, eighth, and twelfth grades having "demonstrated competency over challenging subject matter, including English [and] mathematics . . . "[17] This is precisely what the Louisiana test does for fourth and eighth graders. Neither

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[16] Pub. L. No. 106-113, Div. B, § 1000(a)(4), 113 Stat. 1535.

[17] 20 U.S.C. § 5812(3)(A).

this statute nor 20 U.S.C. § 5886 expressly provides for a private right of action, and neither passes this Court's four-factor test for implying a private right of action. *See, Cort v. Ash*, 422 U.S. 66 (1975).

B. La. R.S. 17:24.4 Does Not Create Or Support A Cause Of Action.

Petitioners' brief asserts, without citation of any authority, that there is a state constitutional issue arising from La. R.S. 17:24.4. The statute provides that the Louisiana Department of Education shall establish a definitive level for student proficiency. In the event a student fails to meet this level, the Department of Education is required to establish an intervention plan to assist the student in achieving the required level. This intervention may include retention in grade. The statute does not provide for any private cause of action.

Louisiana courts routinely have held that if a statute does not expressly provide for a private right of action, then one does not exist. *See, e.g., Johnson v. Hardy*, 98-2282 (La. App. 1 Cir. 11/5/99), 756 So.2d 328, 334 ("We conclude that if the legislature had intended such a result [for a private cause of action], it would have included language expressly recognizing such a cause of action . . . ").[18]

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[18] *Accord: Theriot v. Midland Risk Ins. Co.*, 95-2895 (La. 5/20/97), 694 So.2d 184, 193, where the Louisiana Supreme Court held that a private right of action expressly granted in one portion of a statute could not be applied to other portions of the statute. The reason was that "the expression of legislative intent

Petitioners' state due process constitutional arguments based on this statute fare no better than their federal due process claim. Under the Louisiana constitution, just as under the United States Constitution, a due process inquiry is triggered only by a deprivation of a property interest.[19] No such interest exists here, either for students or their parents.

IV. The Petitioners' Claims Are Moot.

While this case is not worthy of certiorari, those opposing certiorari have an obligation to inform the Court about potential mootness of the Petitioners' application. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000).

Petitioners' complaint did not seek to eliminate the use of the test; rather, they merely sought a delay in its being administered and sought to be promoted to the next grade despite not having received satisfactory scores on the March 2000 test.

A year and a half of schooling has passed for the student Petitioners who were in the fourth and eighth

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in those instances [in the statute] is express and unambiguous. In the absence of an equally clear expression of legislative will, we are unwilling to adopt a more expansive interpretation" applying the limited private right of action to other areas of the statute.

[19] La. Constitution, Art. I, § 2: "No person shall be deprived of life, liberty, or property, except by due process of law." *Price v. U-Haul Co. of La.*, 98-1959 (La. 9/8/99), 745 So.2d 593, 594 ("An essential requirement in any due process challenge is that the claimant must show that some property or liberty interest has been affected.").

grades when the suit was filed in August 2000. The argument that they should not be retained in their grade for school year 2000-2001 is moot because the 2000-2001 school year is complete. Even assuming, *arguendo*, that the Petitioners had a cause of action, an appeal must be dismissed when it is impossible for the Court to grant "any effectual relief whatever." *Mills v. Green*, 159 U.S. 651, 653 (1895). This court sustained a similar mootness argument in *DeFunis v. Odegaard*, 416 U.S. 312 (1974) *(per curiam)*, a challenge to constitutionality of a law school admissions process when the petitioner was about to complete his studies at the time certiorari was sought and would be allowed to complete his studies regardless of the outcome of the petition.

The argument that the Petitioners here did not have sufficient notice of the test is likewise moot, for if they had to retake the LEAP test again in March 2001,[20] they had ample time to prepare for it.

Finally, the argument that the use of the test attaches a " 'stigma' of failure" (Pet. Brief, p. 24) creates no justiciable controversy at this point. The students have gone through a year and a half of school since the suit was filed. Any alleged "stigma" already has occurred.[21] A purported stigma does not overcome mootness. As this Court held in *St. Pierre v. United States*, 319 U.S. 41, 43 (1943), in finding moot a challenge to a contempt citation when the sentence had been completed prior to the time

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[20] The tests are administered in March; *see* Pet. Brief, p. 7.

[21] The Respondents do not concede that any such stigma has in fact occurred.

that certiorari was granted, "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review."

V. The Appellate Court Lacked Jurisdiction; The Notice Of Appeal Was Defective.

While the Fifth Circuit found that it had jurisdiction to reach the merits of Petitioners' appeal, the question of jurisdiction will have to be addressed should certiorari be granted. The Petitioners' notice of appeal sought to appeal a minute entry, not a final judgment; their notice of appeal to the Fifth Circuit specifically limited the appeal to the September 19th minute entry and expressly excluded the October 10, 2000 judgment.[22] Even if Petitioners were attempting to appeal the minute entry dated September 14, 2000 and entered on September 19, 2000 (R. 27-28), this minute entry is not a final judgment and does not meet Fed. R. Civ. P. 58's requirements for a judgment.

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[22] The notice of appeal (1 R. 3, emphasis supplied) provides:

> Notice is hereby given that Parents Against Testing Before Teaching, et al., plaintiffs in the above-named complaint, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Judgment of this Honorable Court rendered herein *on the 19th day of September 2000* with respect to plaintiffs' constitutional claims and federal and state statutes. *This appeal does not pertain to the Court's October 10, 2000 Judgment* wherein this Honorable Court granted plaintiffs' Unopposed Motion to Dismiss Title VI Claims without prejudice and plaintiffs reserving the right to reurge said claims.

Transit Mgmt. of SE La., Inc. v. Group Ins. Admin., Inc., 226 F.3d 376, 382 (5th Cir. 2000).

CONCLUSION

The petition for writ of certiorari should be denied because Petitioners do not meet any of the usual and customary criteria for a writ of certiorari, and the matter is now moot. Further, the notice of appeal below was fatally defective.

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